Supreme Court, U.S.
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No. 95-972

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ROSE ANN ROTHENBUSCH,

Petitioner,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER SPECIFIC INTENT TO DISCRIMINATE ON THE BASIS OF SEX IS A NECESSARY ELEMENT IN PROVING AN EMPLOYER HAS INFLICTED A HOSTILE ENVIRONMENT ON AN EMPLOYEE IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964?

LIST OF PARTIES

The parties to the proceedings and in this Court are Petitioner Rose Ann Rothenbusch, the plaintiff-appellant below, and Respondent Ford Motor Company, the defendant-appellee below. *Amici Curiae* in this Court are the National Employment Lawyers Association and the NOW Legal Defense and Education Fund. The interests and background of *Amici Curiae* are described in the motion for leave to file this brief.

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MOTION OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND NOW LEGAL DEFENSE AND EDUCATION FUND FOR LEAVE TO FILE A BRIEF *AMICI CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The National Employment Lawyers Association ("NELA") and the Now Legal Defense and Education Fund ("NOW LDEF") move the Court, pursuant to U.S. Sup. Ct. R. 21.2(b), for leave to file a brief *Amici Curiae* in support of the petition for writ of certiorari because, in the words of U.S. Sup. Ct. R. 37.1, they can "bring[] relevant matter to the attention of the Court that

has not already been brought to its attention by the parties." Beginning with a reformulation of the primary question presented by Petitioner and continuing through a description of how the holding by the court below has broad and untoward factual and legal consequences, their brief contributes knowledge and insight in the area of sexual harassment garnered through years of nationwide litigation, education, and advocacy.

By identifying aspects of the question presented that were omitted from the Petition and are unlikely to be discussed in Respondent's brief, *Amici Curiae* can supply the Court with a better appreciation of the importance of the question presented and its practical ramifications. *Amici Curiae* add a perspective that private counsel representing a single client is rarely able to provide.

NELA is a non-profit professional organization comprised of over 2,000 lawyers in 48 States and the District of Columbia who represent individual employees and applicants in employment and labor matters. NELA regularly sponsors continuing legal education programs; publishes newsletters, including THE EMPLOYEE ADVOCATE, which is an extensive supplement of materials to members updating developments in employment and labor law and sharing their experience in this field; operates an electronic forum, NELANet; testifies before legislatures; and submits *amicus curiae* briefs in federal and State courts throughout the country. *See, e.g., Morales v. Barge-Wagener Construction Co.*, 114 S. Ct. 579 (1993)(memorandum order granting NELA leave to file a brief *amicus curiae*).

Sexual harassment has often been a topic of NELA publications and presentations, and thousands of sex discrimination claims have been pursued by NELA members. NELA has filed *amicus* briefs in sexual harassment cases. *See, e.g., Clarke v. Kentucky Fried Chicken of California, Inc.*, 57 F.3d 21, 22 (1st Cir.

1995); *Popovich v. Irlando*, 811 P.2d 379, 380 (Colo. 1991).

NOW LDEF is a leading national non-profit civil rights organization that performs a broad range of legal and educational services in support of women's efforts to eliminate sex-based discrimination and secure equal rights. NOW LDEF was founded in 1970 by leaders of the National Organization of Women. Since then, NOW LDEF has often appeared as an *amicus curiae* in this Court. *See, e.g., Bowen v. Kendrick*, 487 U.S. 589, 592 (1988) (referring to NOW LDEF brief *amicus curiae*); *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1, 3 (1988)(same); *United States Postal Service Board of Governors v. Aikens*, 460 U.S. 711, 712 (1983)(same).

A major goal of NOW LDEF is the elimination of barriers that deny women economic opportunities, and sexual harassment has been one of the most problematic of those barriers. In furtherance of that goal, NOW LDEF litigates cases to secure full enforcement of laws prohibiting sexual harassment. *See, e.g., Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991), *cross appeals dismissed per stipulation* (11th Cir. 1995); *Townsend v. Indiana University*, 995 F.2d 691 (7th Cir. 1993). NOW LDEF has also filed *amicus* briefs in sexual harassment cases. *See, e.g., Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993).

Although Petitioner has consented to the filing of this brief *amici curiae*, Respondent has not given consent. Consequently, leave to file is required.

Respectfully submitted,

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PETITION

Amici Curiae National Employment Lawyers Association and NOW Legal Defense and Education Fund respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled case on July 20 1995.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not reported and has been reprinted in the appendices to the Petition for Writ of Certiorari docketed on December 21, 1995. The opinion of the United States District Court for the Southern District of Ohio is also not reported and has similarly been reprinted in the appendices to the Petition.

JURISDICTION

This action arose under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, *et seq.*; Ohio Laws Against Discrimination, Ohio Rev. Code §4112.02(A); and Ohio common law, and jurisdiction was vested in the United States District Court for the Southern District of Ohio by 28 U.S.C. §§ 1331; 1367. The appeal was predicated on 28 U.S.C. §1291. This Court's jurisdiction arises under 28 U.S.C. §1254.

STATUTORY PROVISIONS INVOLVED

§703(A) OF TITLE VII, 42 U.S.C. §2000e-2(a)

It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§4112.02(A), OHIO REVISED CODE

It shall be an unlawful discriminatory practice:

(A) For any employer, because of race, color, religion, sex, national origin, handicap, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case submitted in the Petition for Writ of Certiorari. The point crucial to the question here presented is the appellate court affirmance of jury instructions precluding a finding of a sexually hostile environment when the harasser was motivated by personal animosity. The courts below were construing Title VII of the Civil Rights Act of 1964 to supply the legal standards applicable under Ohio's parallel statute.

REASONS FOR GRANTING THE WRIT

I. Summary

Emerging in the lower federal courts is a broken-romance defense to liability for a sexually hostile work environment. The harasser and employer are being excused when the target had initially welcomed a relationship. Thus, the appellate court below could predicate its opinion on the observation that "[t]his case appears to be the classic story of workplace romance turned sour." App. 1-2. *See also, Cram v. Lamson & Sessions Co.*, 49 F.3d 466, 468 (8th Cir. 1995)("This case concerns a workplace romance gone awry.").

The legal issue reflected in the crucial jury instructions given in this case focuses on the motivation for the hostile environment. Under such instructions, the key question mistakenly becomes whether the ex-lover, who demonstrably had imposed a sexually hostile environment, was ***merely*** venting personal animosity. That the environment was the product of such a motivation then creates immunity from liability.

These instructions effectively require proof of a specific intent to discriminate. That requirement depends on the notion that a sexually hostile work environment imposed by the ex-lover and tolerated by the employer is permissible if neither was motivated specifically by sex. This notion is flatly inconsistent with equal employment opportunity laws, misconstruing them to require proof beyond the general intent to discriminate readily inferred from imposition of a sexually hostile work environment.

Lower courts have decided this important legal issue under Title VII in a way that deviates from this Court's precedent on Title VII's protection from sex discrimination. The petition should, therefore, be granted.

II. Concocting a Defense by Requiring Proof of Specific Intent.

Increasingly, employers are attempting to distinguish discriminatory intent from personal animus. They tend to borrow specific intent concepts from precedent on retaliation, *Ashkin v. Time Warner Cable Corp.*, 52 F.3d 140, 144 (7th Cir. 1995)("her complaints arose solely out of a non-sexual personality clash between two aggressive individuals"), or constructive discharge, *Goss v. Exxon Office Systems Co.*, 747 F.2d 885, 887-88 (3d Cir. 1994)(surveying cases that "appear to have required a finding that discrimination complained of amounted to an intentional course of conduct calculated to force the victim's resignation" and rejecting them in favor of "an objective standard, requiring no more than a finding that the conduct complained of would have the foreseeable result that working conditions would be so unpleasant").

Of course, a specific intent to discriminate is actionable whenever harassment in any form occurs. Even absent specific intent, though, a general intent to discriminate may be inferred under equal employment opportunity laws when the harassment itself is of a sexual nature. The error of the courts below is their confusion of proof ***sufficient*** to state a claim for a sexually hostile work environment -- specific intent -- with proof ***necessary*** for that claim -- general intent. Whether the intent behind the sexually hostile work environment is personal animosity or perversity becomes irrelevant when the effect by any objective analysis is a work atmosphere polluted by sex-related harassment.

A. Nature of Hostile Environment

This Court has twice directly addressed sexual harassment claims under Title VII. In *Harris v. Forklift Systems, Inc.*, 114 S. Ct. 367 (1993), this Court rejected the approach in some federal appellate circuits that required

targets to present evidence of a severe psychological effect from the hostile environment. This Court recognized that interference with the terms and conditions of employment will usually occur before the target's injury reaches that level and that the totality of circumstances, including frequency, severity, physical or verbal nature, and the effect on the victim, must be considered.

A key passage in *Harris v. Forklift Systems, Inc.*, *supra*, 114 S. Ct. at 270, emphasized the proper focus on the effect a sexually hostile work environment has on women:

> Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

In *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 557 (1986), this Court was similarly concerned with pollution of the environment by sex-based hostility. The intent element in typical sexual harassment claims was nearly assumed: "Without question, when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." 477 U.S. at 64. The employer's attempt to limit Title VII to tangible economic loss was then rejected in *Vinson* because the statute prohibits the "entire spectrum of disparate treatment." *Id.* Finally, the Equal Employment Opportunity Commission (EEOC) guidelines, 29 C.F.R. §1604.11(a)(3), were approvingly cited for reaching harassment that had the purpose ***or*** effect of creating a hostile environment.

These decisions and their rationales strongly suggest that specific intent is ***not*** required to prove a hostile environment. Personal motivations, ranging from animosity to lust to a simple inability to control one's workplace conduct, are often used by plaintiffs to explain why the harasser imposed a sexually hostile work environment. The jury instruction approved by the appellate panel below transformed these motivations into ***exculpatory*** evidence.

B. Intent under Title VII.

As a general matter specific intent is not required to prove a violation of Title VII. No greater burden should be imposed in sex discrimination cases. Early precedent focused on the remedial provision, 42 U.S.C. §2000e-5(g), which refers to an employer found to have "intentionally engaged in . . . an unlawful employment practice." This element of intent was construed to require "only that the defendant meant to do what he did, that is, his employment practice was not accidental." *Local 189, United Papermakers & Paperworkers v. United States*, 416 F.2d 980, 996 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). This approach to intent was also used when employers invoked protective laws to demonstrate their good faith. *Schaeffer v. San Diego Yellow Cabs, Inc.*, 462 F.2d 1002, 1006 (9th Cir. 1972).

Imposition of a specific intent requirement for proof of a sexually hostile work environment claim has, however, been erroneously justified by the language in Title VII's prohibition of disparate treatment: "because of sex". Importantly, a general intent satisfies that standard. Indeed, there is a contradiction in terms when a court finds insufficient proof of differential treatment because of sex on a record that, based on any objective analysis, is replete with extensive harassment of a sexual nature.

This Court has not addressed the legal issue of whether the requisite intent to discriminate can be inferred from harassment of a sexual nature. *Cf. Harris v. Forklift Systems, Inc.*, *supra*, 114 S. Ct. at 372 (1993)(Ginsburg, J., concurring)("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.").

Usually a hostile environment is inflicted through sex-related behavior. That the subjective motivation of the harasser is personal animosity should make no difference in that situation. Only by converting Title VII into a specific intent statute would motivation in such circumstances matter. The fundamental argument against a specific intent requirement where harassment of a sexual nature is involved is that, whatever motivated that harassment, the employer violates Title VII by forcing the employee to suffer it as a term or condition of employment.

C. Reinforcing the Floodgates.

Lower courts seem concerned that a flood of Title VII actions will overwhelm dockets in light of the persistence of workplace romance and the multifarious motivations underpinning sexual harassment. This concern that every workplace romance will sour into a federal claim is unwarranted. The facts in *Cram v. Lamson & Sessions Co.*, *supra*, a case where no sexual harassment was found, illustrate that clean breaks can be made without imposing a hostile environment.

The case involved an ex-lover who "made no sexual comments, threats, or references to her job status" and supervisors' decisions that, while "implying a personal dislike or distrust of Cram herself," were "not the same as statements found to imply discriminatory attitudes toward women as a group" or those "based on discriminatory

attitude toward women." 49 F.3d at 469, 472. The critical aspect of the facts was that the ex-lover "did not make any sexual comments, advances or requests after their consensual relationship ended;" indeed, his efforts to woo back his lover were not entirely fruitless. 49 F.3d at 472 (plaintiff had accepted an expensive Valentine's Day gift).

Their supervisor/subordinate relationship at work was totally asexual and professional: the supervisor never "brought any personal issues into their discussion" of a leave request, and his "workplace interactions with Cram during the period following the breakup of their relationship were brief, sporadic, nonsexual, nonthreatening, and polite." 49 F.3d at 473-74. Absent "inappropriate language or . . . sexual or intimidating comments either in person or in the notes," a hostile environment could not be established. 49 F.3d at 475.

In contrast, *Amici* respectfully suggest that, as in the instant case, an actionable hostile environment would arise when personal animosity stemming from a broken romance is implemented by sexual means at the workplace. *Burns v. McGregor Electronic Industries, Inc.*, 989 F.2d 959, 965 (8th Cir. 1993), involved a spurned would-be lover, but the court's rejection of a personal animosity defense, which it described as a "callous explanation," is illustrative: "There is no excuse in any work environment for subjecting a female worker to such verbal abuse even if the harasser and the plaintiff did not like each other." There is even less excuse for the sort of harassment Petitioner suffered, which included dissemination through the workplace of pornographic drawings identifying her by name.

D. Inferring General Intent to Discriminate.

A general discriminatory intent is intrinsic to a sexually hostile work environment. "The intent to discriminate on the basis of sex in cases involving sexual propositions, innuendo, pornographic materials, or sexual

derogatory language is implicit, and thus should be recognized as a matter of course." *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 n. 3 (3d Cir. 1990).

A general intent to discriminate may be inferred even when the harassment does not amount to a sexual assault. "[A]n employee can demonstrate that there is a sexually hostile work environment without proving blatant sexual misconduct." *Spain v. Gallegos*, 26 F.3d 439, 447 (3d Cir. 1994). *Accord Burns v. McGregor Electronic Industries, Inc.*, *supra*, 989 F.2d at 964 ("Sexual harassment can take place in many different ways. A female worker need not be propositioned, touched offensively, or harassed by sexual innuendo . . . .").

Sexual harassment is predominantly suffered by female employees. Their presence in the workplace is conditioned on a burden that male employees do not bear. *Hutchison v. Amateur Electronic Supply, Inc.*, 42 F.3d 1037, 1043 (7th Cir. 1994), discussed this situation in rejecting the employer's argument that both male and female employees were or would have been offended by the immature antics of a supervisor:

> It blinks reality to claim that sexual conduct which demeans women by a man in a position of power, even if not directed at a specific woman victim, equally impacts male and female subordinates. This disparate effect is the discriminatory element in a hostile environment.

Ignoring this reality of the workplace encourages assertion of an equal opportunity offender defense. Only in an artificial sense would a female employee's terms and conditions of employment not be different but for her sex if male employees are exposed to the same terms and conditions. Just such a distorted view of reality led the court in *Rabidue v. Osceola Refining Co.*, 805 F.2d 611, 620 (6th Cir. 1986), to make the unacceptable suggestion

of an equal opportunity offender defense: "It is of significance that instances of complained of sexual conduct that prove equally offensive to male and female workers would not support a Title VII charge because both men and women were accorded like treatment." The supervisor who acts out his personal animosity towards all employees should, however, be liable if the acts toward female employees were sex-related or the animosity traced to a sex-based reason for harassing a female employee and the conduct, by any objective standard, created a sexually hostile environment.

The *Vinson* decision approved the EEOC recognition of a hostile environment because "the EEOC drew upon a substantial body of judicial decision and EEOC precedent holding that Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." 477 U.S. at 65. Although this Court later referred to "discrimination based on sex," its extensive quotation from *Henson v. Dundee*, 682 F.2d 897, 902 (11th Cir. 1982), included the passage that women could not be made to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living." 477 U.S. at 67.

In *Harris v. Forklift Systems, Inc.*, *supra*, the combination of an objective and subjective perspective demonstrates that harassment of a sexual nature inherently discriminates regardless of the harasser's motivation. The employer's specific intent was not then before the Court; however, inferring the requisite intent from harassment of a sexual nature does not depend on proof of such specific intent. Proof of a general intent to discriminate must suffice when a sexually hostile work environment has been imposed or tolerated by the employer.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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